United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

NOS. 76-4151, 76-4153

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GREENE COUNTY PLANNING BOARD, *et al.*,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondents,

POWER AUTHORITY OF THE STATE OF NEW YORK, *et ano.*,

Intervenors.

REHEARING EN BANC PURSUANT TO ORDER OF FEBRUARY 15, 1977

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF FEDERAL POWER COMMISSION

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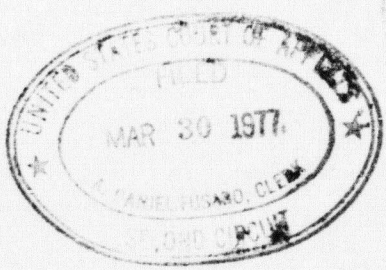

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GREENE COUNTY PLANNING BOARD, et al.,

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Rehearing En Banc Pursuant to Order of February 15, 1977

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT OF FEDERAL POWER COMMISSION

Pacific Legal Foundation respectfully moves this Court for an Order pursuant to Rule 29 of the Federal Rules of Appellate Procedure granting it leave to participate as Amicus Curiae and to file the accompanying brief Amicus Curiae in support of the respondents for the reasons set forth herein. PLF has sought but not obtained as of the time of this filing the consent of all parties to file this motion and brief.

IDENTITY OF THE AMICUS CURIAE

Pacific Legal Foundation (PLF) is a non profit, tax-exempt corporation organized and existing under the laws of the State of California, with offices in Sacramento, California and Washington, D.C. PLF was organized for the purposes of engaging in research, study, and litigation in matters affecting the public interest. Policy for the Foundation is set by a seventeen-member Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees, upon evaluation of this matter, has determined that substantial questions affecting the public interest are involved here and has approved the Foundation's participation.

REASONS FOR FILING

Many of PLF's supporters and contributors will be directly affected by the subject matter of this litigation. As citizens and tax payers they have a substantial interest in seeing that federal monies are expended only as statutorally mandated by Congress. Art. 4 § 3, Cl. 2 of the Constitution gives the power to Congress to dispose of the property of the United States. Absent a specific Congressional mandate, federal agencies are not authorized to expend federal funds. Consequently, federal agencies cannot grant to themselves the power to do that which Congress has not allowed them to do.

PLF, as a public interest organization, essentially favors public participation in administrative and judicial proceedings, but believes that any federal financial support for such participation must be firmly grounded in a clear statutory grant of authority for such government expenditures. It is important to point out that financial support for public interest groups is, in effect, the subsidizing of what are private, specific interest groups. As was pointed out by the Nuclear Regulatory Commission:

> Even though many participating groups denominate themselves as "public interest" groups, they in fact reflect essentially the viewpoints of their members as to what constitutes the public interest. As the Comments on the Proposed Rulemaking make clear, it is reasonable to question whether the positions they espouse, which often reflect members' relatively specific interests, are any more entitled to identification with the "public interest" than those of any other private party. Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), NRCI-76/11, 494 CLI-76-23, November 12, 1976, at 26. (Henceforth "NRC Proceedings").

Accordingly, the question of whether a federal agency may expend revenues to pay these intervenors' costs is a legislative one which must be answered by legislative action. Anything short of a clear statutory mandate seriously jeopardizes the public's general interest to ensure the proper and legal disbursement of federal monies.

For the foregoing reasons, Pacific Legal Foundation respectfully requests permission to participate as an Amicus Curiae and to file the attached brief in support of the

respondent Federal Power Commission.

Respectfully submitted,

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Washington, D.C.
March 22, 1977

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-4151
NO. 76-4153

GREENE COUNTY PLANNING BOARD, et al.,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondents,

POWER AUTHORITY OF THE STATE OF NEW YORK, et ano.,

Intervenors.

AMICUS CURIAE PACIFIC LEGAL FOUNDATION'S MOTION FOR PERMISSION TO FILE A (TYPEWRITTEN) COPY OF AMICUS CURIAE BRIEF IN SUPPORT OF FEDERAL POWER COMMISSION

Amicus Curiae Pacific Legal Foundation hereby respectfully moves this Court for permission to file the attached (typewritten) copy of their Amicus Curiae brief in support of Federal Power Commission, copies of which have been served on petitioners' counsel. The principle ground for this motion is that there is not sufficient time for the brief to be prepared by a qualified printer. Bound copies will be forwarded immediately upon completion by the printer. The granting of this motion will not prejudice petitioners or delay the Court's review.

WHEREFORE, Amicus Curiae Pacific Legal Foundation respectfully requests permission to file the attached

typewritten copy of their Amicus Curiae Brief in Support of Federal Power Commission pending reproduction.

Respectfully submitted,

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March 22, 1977

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Rehearing En Banc Pursuant to Order of February 15, 1977

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT FEDERAL POWER COMMISSION

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Rehearing En Banc Pursuant to Order of February 15, 1977

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT FEDERAL POWER COMMISSION

STATEMENT OF ISSUES

The only issue presented for review by this Court en banc pursuant to its order of February 15, 1977 is:

> Whether the Federal Power Commission has the authority to reimburse petitioners for counsel fees and expenses, incurred in connection with their participation in the proceeding: Power Authority of the State of New York, Project No. 2685.

STATEMENT OF THE CASE

PLF adopts the presentation of the facts of this case as found in the Brief of the Federal Power Commission on Petition to Review Orders of the Federal Power Commission, pages 4 through 18.

Additionally, on December 8, 1976, a majority of a panel of this Court issued a decision holding, in part, that the Commission had authority to award attorneys fees and expenses to petitioners. It remanded the case to the Commission for further consideration of Petitioners' claims for reimbursement of their litigation expenses. The Federal Power Commission sought a rehearing en banc concerning this part of the Court's opinion. A majority of this Court granted this request and directed this instant review.

ARGUMENT

I. OPINIONS OF THE COMPTROLLER-GENERAL ARE NOT SUFFICIENT TO AUTHORIZE A FEDERAL AGENCY TO PAY INTERVENOR COSTS.

Section 628 of Title 31 of the United States Code provides:

> Application of Monies Appropriated: Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

This statutory language is clear: only Congress may authorize the expenditure of federal funds, and such a

release of funds shall be applied solely to the objects for which they are respectively made and no others. This power is a constitutional one lodged squarely with the Congress. Article IV, Sec. 3, Cl. 2. "Subordinate officers of the United States are without that power...[citation omitted]." Royal Indemnity Company v. United States, 313 U.S. 289, 294 (1941), Heidt v. United States, 56 F.2d 559, 560 (5th Cir. 1932), Fansteel Metalurgical Corporation v. United States, 172 F. Supp. 268, 270 (Ct. Cl. 1959). Indeed any officer or employee is prohibited from involving the government in any obligation for the payment of money for any purpose, in advance of appropriations made for such purposes, unless such federal obligation is authorized by law. 31 U.S.C. § 665(a).

Absent clear statutory authority, the opinions of the Comptroller-General will not satisfy the lack of such authority and cannot be used as the basis for the payment of costs for intervenors. Authorization for such payments must come from Congress. Turner v. FCC, 514 F.2d 1354, 1356 (D.C. Cir. 1975). Where Congress has desired reimbursement of participants to federal proceedings, it has specifically authorized such reimbursements along with providing the necessary appropriations. A telling example directly parallel to the present situation is the passage of the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, Pub. L. No. 93-637 (January 4, 1975).

In that instance, although the Comptroller-General had ruled on the legality of paying such costs in a letter to the Federal Trade Commission, Congress itself in spite of the opinion passed the Magnuson-Moss bill to provide it with a clear legislative basis to pay such costs. Likewise, another manifestation of Congressional intent is Section 29 of the Toxic Substances Control Act, Pub. L. 96-469 (Oct. 12, 1976).

II. RELIANCE UPON THE OPINIONS OF THE COMPTROLLER-GENERAL WILL NOT CURE THE DEFECT OF LACK OF STATUTORY AUTHORITY

This is illustrated by an examination of the position of the Comptroller-General within the framework of the federal government and the weight and force courts have attached to his opinions. This role was clearly described in United States v. Stewart, 234 F. Supp. 94, (D. D.C.), aff'd., 339 F.2d 753 (D.C. Cir. 1964). In Stewart, the Court stated that "[t]he Comptroller-General is not a law officer. He does not render legal opinions....Technically, a decision of the Comptroller-General upon a question so submitted to him, is not a legal opinion, but rather a rule or announcement that if certain payments were made by disbursing officers in the future, they would be passed or disallowed." Id. at 100. Actions by the Comptroller-General do not opearte as a legal or judicial determination of the rights of the parties.

Curtis-Wright Corporation v. McLucas, 381 F. Supp. 657, 659 n.2 (D.N.J. 1974), Wheelabrator Corp. v. Chafee, 455 F.2d, 1306, 1313 (D.C. Cir. 1971). His opinions when connected to his historical duties may be given weight. For example, under 31 U.S.C.A. § 71, "...all accounts whatever in which the government...is concerned...shall be settled and adjusted by the GAO." Further, balances (related to keeping accounts of the disbursing and collecting officers) certified by the Comptroller-General shall be final and conclusive upon the executive branch." 31 U.S.C.A. §§ 44, 74. He may investigate all matters "relating to the receipt, disbursement and application of federal funds, and make reports and recommendations to Congress."31 U.S.C.A. §§ 53-60. Yet even within these historical areas of expertise courts have not hesitated to reverse his opinions. Keco Industries v. Laird, 318 F. Supp. 1361, 1363 (D. D.C. 1970).

Clearly, under such circumstances, opinions of the Comptroller-General cannot authorize or provide the authority to expend public funds to pay intervenors' costs. He has no legislative mandate to perform what essentially must be a legislative act to commit federal funds to pay these costs. Against this background, a far clearer Congressional mandate than a patchwork of Comptroller-General letters and opinions is required for agencies to spend funds for such purposes. Absent such specific authorization, it is inap-

propriate to reallocate the burdens of litigation. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975).

III. DETERMINATION OF PAYMENTS TO INTERVENORS REQUIRES CONGRESSIONAL ACTION. FEDERAL AGENCIES CANNOT SUBSTITUTE ACTION ON THEIR PART IN LIEU OF CONGRESSIONAL ACTION OR ABSENT CONGRESSIONAL APPROVAL. COURTS SHOULD NOT INTERFERE IN THIS PROCESS.

In the scheme of constitutional powers, Congress is the only branch of the federal government with authority to authorize the expenditure of public monies. Article IV, Sec. 3, Cl. 2. As part of this authority, Congress necessarily has an institutional role to resolve issues related to funding. The consequences of this role are aptly described in a statement by the Nuclear Regulatory Commission on this same issue. In this statement, which essentially denied similar requests from intervenors in proceedings before the NRC, it was pointed out that funding involves the direct transfer of public money to support a private viewpoint, a viewpoint which is not subject to the control and oversight by the public's elected representatives and which may or may not reflect the views of members of the public. NRC proceedings at p. 13. To consent to use funds for such purposes is a Congressional prerogative; it requires a policy decision and a legislative act performed by Congress, not by a non-elected division of the federal government. If Congress decides, as a matter of public choice, it shall set forth the scope of and limitations on the use of appropriated funds to assist intervenors such as the Greene County petitioners.

No clearer illustration of this prerogative is found than the fact that presently Congress is deliberating three bills dealing with the subject of intervenors' costs. They are collectively identified as "Public Participation in Federal Agency Procedures Act of 1977," S.270, HR 3361 and HR 3362. In light of these deliberations, the FPC's policy should not be disturbed. Judicial action on this issue is clearly inappropriate until Congress has acted.

CONCLUSION

For the reasons stated above, this Court should affirm the Commission's order issued January 29, 1976, denying an award of attorneys' fees and other expenses to the petitioners.

Respectfully submitted,

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Washington, D.C.
March 22, 1977

Attorneys for Amicus Curiae
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CERTIFICATE OF SERVICE

I, Albert Ferri, Jr. hereby certify that I have caused to be mailed by first class mail, postage prepaid on March 22, 1977 the foregoing Motion for Leave to Participate as Amicus Curiae in Support of Federal Power Commission, Motion for Permission to File a (Typewritten) Copy of Amicus Curiae Brief in Support of Federal Power Commission, and the Brief of Amicus Curiae Pacific Legal Foundation in Support of Respondent Federal Power Commission to the following:

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